

## Legislative Facts in *Grutter v. Bollinger*

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In 1924, Henry Wolf Biklé, a Philadelphia lawyer who also taught at the University of Pennsylvania Law School for twenty-eight years, published a pioneering article to show that the constitutional validity of legislative action often depended on generalizations about social, economic, political, scientific, medical, or psychological matters that reviewing courts, particularly the United States Supreme Court, accepted as true.<sup>1</sup> One of the examples Biklé gave was the *Lochner* case,<sup>2</sup> in which the Supreme Court held that a state law limiting the hours worked in bakeshops had “no substantial relation to the promotion of the public health.”<sup>3</sup>

Professor Kenneth Culp Davis called these factual generalizations “legislative facts”—facts which “assist in the creation of law or the determination of policy”—and distinguished them from “adjudicative facts”—facts of the particular case which concern only the parties to the case and answer the questions who did what to whom, where, when, how, why, with what motive and intent.<sup>4</sup> These terms have come to be generally accepted. The term *legislative facts* includes the findings of fact that accompany and justify legislation by Congress and the state

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1. Henry Wolf Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924).

2. *Lochner v. New York*, 198 U.S. 45 (1905).

3. Biklé, *supra* note 1, at 7.

4. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–25 (1942); *see also* FED. R. EVID. 201(a) advisory committee’s note.

legislatures as well as the factual generalizations invoked by courts and administrative agencies to justify the laws they make.<sup>5</sup>

Dissatisfaction with the way courts have handled legislative facts has a long lineage. In 1930, Dean Herbert Goodrich of the University of Pennsylvania Law School complained that

[w]e really know very little about how our legal rules affect the conduct and welfare of the men and women to whom they are applied. . . . Judges have laid down rules on the basis of public policy without the slightest support for the policy except preconceived opinion, and without either knowing or having means of knowing whether the policy declared was or was not aided by the particular decision rendered.<sup>6</sup>

Philosopher Morris R. Cohen found in 1933 that courts were “making all sorts of factual generalizations without adequate information” and the “facilities of our courts for acquiring information as to actual conditions are very limited.”<sup>7</sup> He also cautioned that “the law cannot simply and uncritically accept all the opinions of economists or sociologists.”<sup>8</sup>

These concerns were not alleviated by Federal Rule of Evidence 201, which adopts Professor Davis’s distinction between adjudicative and legislative facts.<sup>9</sup> The Notes of the Supreme Court’s Advisory Committee explain that Rule 201 deals only with judicial notice of adjudicative facts and that none of the Federal Rules of Evidence deals with judicial notice of legislative facts. Nor did any other federal statute or rule of civil or criminal procedure govern the judicial notice of legislative facts until the enactment of Federal Rule of Evidence 702 in 1975.<sup>10</sup> According to the Advisory Committee, this omission from Rule 201 was intended to permit legislative facts to be judicially noticed, even if they did not satisfy the requirements for the judicial notice of adjudicative facts. Under Rule 201, judicial notice may be taken of adjudicative facts only if they are not “subject to reasonable dispute” because they are “generally known within the territorial jurisdiction of the trial court” or

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5. See generally THE LEGAL PROCESS 90–137 (Carl A. Auerbach et al. eds., 1961) (collecting various articles and sources addressing the legislative fact issues in the *School Segregation Cases* and the judiciary’s role); Carl A. Auerbach, *The Anatomy of an Unusual Economic Substantive Due Process Case: Workers’ Compensation Insurers Rating Association v. State*, 68 MINN. L. REV. 545, 581–612 (1984) (discussing judicial consideration of legislative fact issues in workers’ compensation rate regulation).

6. Herbert F. Goodrich, *The Improvement of the Law*, 4 TEMPLE L.Q. 311, 324–25 (1930).

7. MORRIS R. COHEN, LAW AND THE SOCIAL ORDER 186 (Archon Books 1967) (1933).

8. *Id.*

9. FED. R. EVID. 201(a) advisory committee’s note.

10. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1937 (enacting the Federal Rules of Evidence); RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE 744 (4th ed. 2002).

they are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”<sup>11</sup>

The Advisory Committee also explained that courts are not required to inform the parties of the legislative facts to be judicially noticed or to give them an opportunity to be heard on the propriety of taking judicial notice “other than [the requirements] already inherent in affording opportunity to hear and be heard and exchanging briefs.”<sup>12</sup> Nor are the courts at any level required to make formal findings of the legislative facts judicially noticed. However, the Advisory Committee suggested the possibility should be left open “of introducing evidence through regular channels in appropriate situations,” citing, as an example, *Borden’s Farm Products Co. v. Baldwin*,<sup>13</sup> “where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.”<sup>14</sup>

Biklé was of the opinion that the training and experience of judges did not qualify them “to deal in an expert way” with legislative facts and so they “should not undertake to do so except when the relevant facts are properly brought before them either by means of direct evidence or through such presentation as justifies judicial notice.”<sup>15</sup> He thought the Supreme Court of his time handled the ascertainment of legislative facts that determined constitutional validity in three different ways. As in *Lochner*, the Court decided “the controlling questions of fact on the basis of *a priori* reasoning.”<sup>16</sup> As in *Muller v. Oregon*, it took judicial notice of the legislative facts set forth in the Brandeis brief in that case to show the existence “of a widespread belief that woman’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.”<sup>17</sup> And as in *Chastleton Corp. v. Sinclair*,<sup>18</sup> the Supreme Court required the taking of evidence by the trial court on legislative facts—whether the war-created emergency that justified rent control in the District of Columbia in 1919 ended by 1922.

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11. FED. R. EVID. 201(b).

12. FED. R. EVID. 201(a) advisory committee’s note.

13. 293 U.S. 194 (1934).

14. FED. R. EVID. 201(a) advisory committee’s note.

15. Biklé, *supra* note 1, at 21.

16. *Id.* at 12.

17. 208 U.S. 412, 420 (1908).

18. 264 U.S. 543 (1924).

Currently, Professor Pierce writes, in determining the legislative facts that will resolve issues of law and policy, federal judges and Supreme Court Justices

rely on some combination of their own prior knowledge of relevant fields and the writings of experts in the relevant fields. In this process, they are not limited to writings in the evidentiary record compiled in the trial court or even to writings brought to their attention in briefs or in oral arguments. They can, and often do, rely on sources they discover in their own research (or that of their clerks) and on sources with which they had prior familiarity in some other context.<sup>19</sup>

In some cases, legislative facts of constitutional significance have been presented at the trial stage by expert witnesses subject to cross-examination and rebuttal. In others, the Court has taken judicial notice of legislative facts without giving the parties an opportunity to challenge them. In the *School Segregation Cases*,<sup>20</sup> more than forty psychiatrists, psychologists, social scientists, and educators testified in four of the five cases in the federal district courts on the harmful effects of legally enforced school segregation and the anticipated consequences of desegregation. They sought to show that the assumption of innate intellectual differences between races is scientifically unsound and, therefore, the classification of pupils on a racial basis did not fulfill a reasonable educational purpose but harmed black children. They also testified that school desegregation could be accomplished without undue conflict or violence, provided strong government leadership was exercised.

At the appellate stage, thirty-two sociologists, anthropologists, psychiatrists, and psychologists working in the field of American race relations submitted *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement* as an appendix to appellants' briefs in these cases.<sup>21</sup> The Supreme Court took judicial notice of the *Statement* in its famous footnote 11, which referred to a finding in the Kansas case by the federal district court that legally enforced segregation in the public schools had a detrimental effect upon the black children because it implied their inferiority and so retarded their educational and mental development. This finding, the Court held, was "amply supported

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19. PIERCE, *supra* note 10, at 745–46. The failure of Rule 201 to deal with the judicial notice of legislative facts has led some courts to apply the requirements for the judicial notice of adjudicative facts to legislative facts, despite the Advisory Committee Notes.

20. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

21. Appendix to Brief for Appellants, *Brown*, 347 U.S. 483 (Nos. 1, 2, 4, 10), reprinted in 37 MINN. L. REV. 427 (1953).

by modern authority” and, in footnote 11, it listed the pertinent works of the experts who embodied modern authority.<sup>22</sup>

The treatment of the disputed legislative facts in the *School Segregation Cases* was procedurally fair to the parties because the experts who testified to them in the federal district courts were subject to cross-examination and rebuttal. The *Social Science Statement* in the Brief for the Appellants in the Supreme Court contained little that was not covered by the testimony in the lower federal courts.

By way of contrast, in *Roe v. Wade*,<sup>23</sup> as Judge Friendly has written, “no evidence was offered at the hearing before the three-judge court except affidavits of two physicians that legal abortions were extremely safe and illegal abortions were exceedingly dangerous.”<sup>24</sup> But the appellants’ brief in the Supreme Court had a supplementary appendix “characterized as being ‘offset reproductions of particularly relevant legal, medical and social science publications, all of which are in the public domain,’” and amici briefs supporting appellants also contained extensive factual generalizations of which the Court was asked to take judicial notice.<sup>25</sup> In addition, Justice Blackmun conducted research on his own to ascertain the legislative facts he regarded as material. The parties in the litigation were given no opportunity to comment on or rebut the legislative facts Justice Blackmun found and incorporated in his opinion. The Federal Rules of Evidence, as Judge Friendly pointed out, did not require that such an opportunity be afforded.<sup>26</sup> And, it might be added, the Supreme Court has not held that due process requires it. Nevertheless, Judge Friendly concluded, whenever a court intends to take judicial notice of data outside the record to help it formulate a rule of constitutional law, it should, as a matter of fairness and to prevent egregious error, submit the data to the parties for examination, cross-examination, and rebuttal.<sup>27</sup>

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22. *Brown*, 347 U.S. at 494 & n.11.

23. 410 U.S. 113 (1973).

24. Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 36 (1978).

25. *Id.* at 36–37 (quoting Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1200 (1975)).

26. *Id.* at 38; FED. R. EVID. 201(a) advisory committee’s note.

27. Friendly, *supra* note 24, at 38–39; see also JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* 181–351 (5th ed. 2002); Joseph A. Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 51 (1988); George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge’s Sua*

If Judge Friendly's advice is followed and legislative facts of constitutional significance are sought to be presented at the trial stage, subject to cross-examination and rebuttal, Federal Rule of Evidence 702, enacted in 1975, will apply. As enacted, Rule 702 provided: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."<sup>28</sup> In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that Rule 702 imposes upon the trial judge a "gatekeeping responsibility" to make "a preliminary assessment of whether the reasoning or methodology underlying the testimony [of an expert witness] is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."<sup>29</sup> In *General Electric Co. v. Joiner*, the Court added that the trial judge's ruling to admit or exclude such expert testimony would be reviewed by the appellate court only for abuse of discretion.<sup>30</sup> Relying upon the express language of Rule 702, the Court held in *Kumho Tire Co. v. Carmichael*<sup>31</sup> that trial judges are obliged to perform this gatekeeping function not only when scientific evidence is in question but also when other technical or specialized knowledge is involved. In response to *Daubert* and *Kumho Tire Co.*, Rule 702 was amended in 2000 to add that experts may testify "in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and

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Sponte, *Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291 (1998); John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571 (1991); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291-96 (1952).

It is interesting to contrast the Court's approach to official notice with its treatment of judicial notice. If an administrative agency takes official notice of a contested material legislative fact in the course of formal adjudication or formal rulemaking, section 556(e) of the Administrative Procedure Act requires the agency to provide a party requesting it with a meaningful "opportunity to show the contrary." PIERCE, *supra* note 10, ch. 10.6. Even when the agency is engaged in informal adjudication or rulemaking and section 556(e) does not apply, courts require the agency to notify the parties of the legislative facts that will be officially noticed so as to afford them a meaningful opportunity to comment upon them. *See* 1 PIERCE, *supra* note 10, chs. 7.3, 7.5. Yet courts do not impose similar requirements upon themselves when they take judicial notice of contested material legislative facts.

28. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1937 (enacting the Federal Rules of Evidence).

29. 509 U.S. 579, 589 n.7, 592-93 (1993).

30. 522 U.S. 136, 141-43 (1997).

31. 526 U.S. 137, 141 (1999).

methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”<sup>32</sup>

The express language of Rule 702, as read in *Kumho Tire Co.*, makes it applicable to legislative facts which require technical and other specialized knowledge for their determination and are proffered by experts at the trial stage.<sup>33</sup> Furthermore, even when the federal court intends to take judicial notice of such legislative facts, Rule 702 as amended provides some general standards that the court should use to determine for itself the propriety of taking such action. If the trial court would not have admitted the proffered testimony, it should not take judicial notice of the legislative facts that such testimony would have presented. This conclusion is buttressed by *New York Times Co. v. Sullivan*<sup>34</sup> and *Bose Corp. v. Consumers Union of United States, Inc.*<sup>35</sup> when legislative facts of constitutional significance are involved.

Yet none of the opinions in the affirmative action cases mention Rule 702, *Sullivan*, or *Bose Corp.* Although the Advisory Committee Notes accompanying the 2000 amendments do not use the term *legislative facts*, the expert testimony they describe includes testimony about legislative facts. But the Notes do not treat legislative facts, even those of constitutional significance, differently from adjudicative facts. They assume that juries will ultimately determine the facts, but judges, not juries, determine legislative facts.<sup>36</sup> The findings of legislative facts by a trial judge are not reviewed by an appellate court under the clearly erroneous standard of Federal Rule of Evidence 52(a). Each appellate court exercises its independent judgment in determining the legislative

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32. FED. R. EVID. 702. In accordance with the Rules Enabling Act of 1934, currently located at 28 U.S.C. § 2071–2077 (2000), the amendments were proposed and drafted by the Judicial Conference Advisory Committee on Evidence Rules. They were then exposed to public comment. Thereafter, they were submitted to the Supreme Court for consideration and promulgation. After promulgating the changes, the Supreme Court submitted them to Congress. Congress did not exercise the veto power it has under the Rules Enabling Act and the amendments became effective December 1, 2000.

33. Linda Auerbach Allderice, my daughter, called my attention to Rule 702 in this context.

34. 376 U.S. 254 (1964).

35. 466 U.S. 485 (1984).

36. See *Dennis v. United States*, 341 U.S. 494, 514–15 (1951) (holding that the Court, not the jury, would determine whether the worldwide Communist movement presented a “clear and present danger” of overthrowing the Government—a legislative fact); *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924); *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210 (1908); 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2555(c) (James H. Chadbourn rev. ed. 1981).

facts, and the Supreme Court has the final word.<sup>37</sup> Nor does *General Electric Co.* apply if legislative facts are at issue. Appellate courts should exercise their independent judgment with respect to the admissibility of expert testimony regarding legislative facts.

That the Supreme Court must independently determine the material legislative facts, especially if they have constitutional significance, is made clear in *Sullivan* and *Bose Corp.* In *Sullivan*, the Supreme Court created a federal rule prohibiting public officials from recovering damages for defamatory false statements relating to their official conduct unless they proved, by clear and convincing evidence, that the statements were made with “actual malice,” that is, with knowledge that they were false or with reckless disregard of whether they were false or not.<sup>38</sup> The Court then held that it would independently determine whether the record justified a finding that actual malice existed in the particular case and stated: “This Court’s duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . We must ‘make an independent examination of the whole record’. . . .”<sup>39</sup> In a footnote, the Court further stated that it must “review the finding of facts [of state trial judges] . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary . . . .”<sup>40</sup> Whether actual malice exists in a particular case is, of course, an issue of adjudicative fact.

In affirming *Sullivan* in *Bose Corp.*,<sup>41</sup> the Court explicitly held that an appellate court’s review of a trial court’s finding of actual malice was not governed by the clearly erroneous standard of Federal Rule of Civil Procedure 52(a). Rather, as a matter of “federal constitutional law,” appellate courts “*must* exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.”<sup>42</sup> As Professor Monaghan has written, *Sullivan* and *Bose Corp.* do not apply only when the First Amendment is at issue but “independent judgment in the first amendment context is merely one example of a systemic issue: the scope of judicial review of the adjudicative facts decisive of constitutional claims.”<sup>43</sup>

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37. See *Lockhart v. McCree*, 476 U.S. 162, 168–69 n.3 (1986).

38. *Sullivan*, 376 U.S. at 283, 285–86.

39. *Id.* at 285 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

40. *Id.* at 285 n.26 (quoting *Fiske v. Kansas*, 274 U.S. 380, 385 (1927)).

41. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984).

42. *Id.* at 510, 514 (emphasis added); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 229 (1985).

43. Monaghan, *supra* note 42, at 230. Monaghan argues that federal appellate courts should be authorized, but not required, to review lower federal and state court findings of adjudicative facts decisive of constitutional law application unless law



If the independent determination of adjudicative facts is required by *Sullivan* and *Bose Corp.* to ensure that constitutional principles are properly applied in the particular case, then the independent determination of constitutionally significant legislative facts is even more necessary to decide the constitutional principles that will be applied.

In upholding the University of Michigan Law School's preferential racial and ethnic admissions program, the Court in *Grutter v. Bollinger* did not mention the applicability of Federal Rule of Evidence 702 at the trial stage of the case.<sup>44</sup> Many expert witnesses testified in the federal district court that tried *Grutter*. No objection seems to have been raised by any party that the testimony of any expert was inadmissible because the methodology used was invalid when tested by accepted social science standards, the methodology was applied improperly in determining the legislative facts, or for any other reason. For example, Professor Patricia Gurin was the most important witness for the University of Michigan and the *Grutter* Court relied on her Expert Report.<sup>45</sup> In her Report, Professor Gurin stated that the data she used were not collected for purposes of the litigation but that her analysis was prepared for litigation purposes.<sup>46</sup> Professor Gurin has been associated with the University of Michigan since 1966.<sup>47</sup> From 1974 to 2002, she was Professor of Psychology and Women's Studies. She served as Chair of the Department of Psychology from 1991 to 1998 and from 1999 to 2002. In 1998–1999, she was Interim Dean of the College of Literature, Science, and the Arts. Since 2002, she has been Director of Research in Michigan's Program on Intergroup Relations.

Should Professor Gurin's long association with the University of Michigan and the fact that she prepared her Expert Report for the litigation have disqualified her from testifying on the university's behalf? On remand in *Daubert*, Judge Kozinsky expressed his views about such a situation:

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application in the particular case "necessitates an appreciable measure of further constitutional norm elaboration." *Id.* at 276. Disputed legislative facts determine the content of the constitutional norm.

44. 539 U.S. 306 (2003).

45. Expert Witness Report of Patricia Y. Gurin, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75231-DT), *reprinted in* 5 MICH. J. RACE & L. 363, 368, 422 (1999).

46. *Id.* at 9, 47.

47. Curriculum Vitae of Patricia Gurin (May 2002), <http://www.vpcomm.umich.edu/admissions/legal/expert/gurinapa.html>.

One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. That an expert testifies for money does not necessarily cast doubt on the reliability of his testimony, as few experts appear in court merely as an eleemosynary gesture. But in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office.

That an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with dictates of good science. . . . For one thing, experts whose findings flow from existing research are less likely to have been biased toward a particular conclusion by the promise of remuneration; when an expert prepares reports and findings before being hired as a witness, that record will limit the degree to which he can tailor his testimony to serve a party's interests. . . . That the testimony proffered by an expert is based directly on legitimate, preexisting research unrelated to the litigation provides the most persuasive basis for concluding that the opinions he expresses were "derived by the scientific method."

. . . .

If the proffered expert testimony is not based on independent research, the party proffering it must come forward with other objective, verifiable evidence that the testimony is based on "scientifically valid principles." One means of showing this is by proof that the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication. . . .

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. . . [T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology.<sup>48</sup>

It should be noted that Judge Kozinski exercised independent judgment in holding that plaintiffs' proffered expert scientific testimony was not admissible to prove that defendant's pills caused their birth defects.<sup>49</sup> He rejected plaintiffs' argument that the case should be remanded to the federal district court so that it could make the initial determination of admissibility under the standard announced by the Supreme Court in *Daubert*.<sup>50</sup> He explained that "[i]n the peculiar circumstances of this case, however, we have determined that the interests of justice and judicial economy will best be served by deciding those issues that are properly before us and, in the process, offering guidance on the application of the *Daubert* standard in this circuit."<sup>51</sup> Judge Kozinski did not read Rule 702 or *General Electric* as requiring the determination of admissibility of expert testimony to be made by the trial court in the first instance.

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48. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317–18 (9th Cir. 1995) (footnotes and citations omitted).

49. *Id.* at 1322.

50. *Id.* at 1314–15.

51. *Id.* at 1315.

Furthermore, when the expert testimony, as in *Grutter*, concerns legislative facts of constitutional significance, which the courts must determine independently, the “gatekeeping responsibility” to assess the propriety of admitting proffered expert testimony must be discharged whether or not there is objection to its admission. The courts in *Grutter* did not discharge this responsibility or even mention Rule 702.

Not a single Justice in *Grutter* indicated an awareness of what was required of the Court in exercising independent judgment to resolve disputes about legislative facts of constitutional significance. No mention was made of *Sullivan* or *Bose Corp.* Yet, as a review of the decision will demonstrate, it was the Justices’ differing assumptions about the material legislative facts that led to their differing views of the constitutionality of the preferential racial and ethnic admissions program challenged in *Grutter*.

“We granted certiorari,” wrote Justice O’Connor for the Court, “to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether [student body] diversity is a compelling [state] interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.”<sup>52</sup> To answer this question, the Court was required to engage in strict scrutiny of the only justification claimed for such use of race—to obtain “the educational benefits that flow from a diverse student body.”<sup>53</sup> In holding that the University of Michigan Law School “has a compelling interest in attaining a diverse student body,”<sup>54</sup> Justice O’Connor wrote:

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits. . . .

. . . Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.”<sup>55</sup>

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52. *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003).

53. *Id.* at 328 (quoting Brief for Respondent Bollinger, *Grutter*, 539 U.S. 306 (No. 02-241)).

54. *Id.*

55. *Id.* at 328–29 (citations omitted).

The educational benefits that student body diversity—that is, enrolling a critical mass of racial and ethnic minority students—is designed to produce are substantial, concluded Justice O'Connor.<sup>56</sup> The Justice then cited the district court's findings that the law school's preferential admissions policy promotes

"cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." . . . These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."<sup>57</sup>

Justice O'Connor added:

The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Brief for American Educational Research Association et al. [the Association of American Colleges and Universities and the American Association for Higher Education] as *Amici Curiae* 3; *see, e.g.*, W. Bowen & D. Bok, *The Shape of the River* (1998); *Diversity Challenged: Evidence on the Impact of Affirmative Action* (G. Orfield & M. Kurlaender eds. 2001); *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* (M. Chang, D. Witt, J. Jones, & K. Hakuta eds. 2003).<sup>58</sup>

Justice O'Connor cited the *amici curiae* briefs in support of the University of Michigan Law School filed by 3M and sixty-four other business corporations and separately by the General Motors Corporation, which maintained that the educational benefits flowing from student body diversity are "real," not "theoretical," because the "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."<sup>59</sup> The Justice then quoted from the *amici curiae* brief in support of the law school by Lieutenant-General Julius W. Becton, Jr.; nine other generals and admirals, including former chairmen of the Joint Chiefs of Staff; supervisors of the service academies; former Senators Max Cleland and Robert J. Kerrey and other war heroes with high government experience; and civilian leaders Daniel W. Christman and the Honorable William Cohen. Justice O'Connor wrote:

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56. *Id.* at 330.

57. *Id.*

58. *Id.*

59. *Id.* at 330–31.

[H]igh-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principal mission to provide national security.” . . . At present, “the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC [Reserve Officers Training Corps] used limited race-conscious recruiting and admissions policies.” . . . We agree that “[i]t requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.”<sup>60</sup>

Relying upon the amicus curiae brief of the Association of American Law Schools, Justice O’Connor states that law schools “represent the training ground for a large number of our Nation’s leaders.”<sup>61</sup>

Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. . . . The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. . . .

. . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.<sup>62</sup>

Thus, Justice O’Connor justified the University of Michigan Law School’s preferential admissions program by taking judicial notice and accepting the validity of the legislative facts asserted in the amici curiae briefs and publications she cited. The Justice added that the law school’s “assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*.”<sup>63</sup> At least sixty-one amici curiae briefs were filed in support of the law school, in addition to the five cited by Justice O’Connor.<sup>64</sup>

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60. *Id.* at 331.

61. *Id.* at 332.

62. *Id.* at 332–33.

63. *Id.* at 328.

64. Briefs were filed on behalf of (1) the New Mexico Hispanic Bar Association, Black Lawyers Association, and Indian Bar Association; (2) the Society of American Law Teachers; (3) the American Law Deans Association; (4) the Lawyers’ Committee for Civil Rights Under Law, National Association for the Advancement of Colored People, Minority Business Enterprise Legal Defense and Educational Fund, Inc., National Women’s Law Center, National Partnership for Women & Families, Coalition

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of Bar Associations of Color, and Sigma Pi Phi Fraternity; (5) the University of Michigan Asian Pacific American Law Students Association, Black Law Students' Alliance, Latino Law Students Association, and Native American Law Students Association; (6) the Deans of Georgetown Law Center, Duke Law School, University of Pennsylvania Law School, Yale Law School, Columbia Law School, University of Chicago Law School, New York University Law School, Stanford Law School, Cornell Law School, and Northwestern University School of Law; (7) the National Center for Fair & Open Testing (Fairtest); (8) the New York State Black and Puerto Rican Legislative Caucus; (9) the American Sociological Association; (10) the Arizona State University College of Law; (11) the Coalition for Economic Equity, the Santa Clara University School of Law Center for Social Justice and Public Service, the Justice Collective, the Charles Houston Bar Association, and the California Association of Black Lawyers; (12) the Hispanic National Bar Association and the Hispanic Association of Colleges and Universities; (13) the King County Bar Association; (14) the Black Law Students Associations of Harvard, Stanford, and Yale; (15) the Law School Admission Council; (16) the Clinical Legal Education Association; (17) the Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists; (18) 13,922 Current Law Students at Accredited American Law Schools; (19) UCLA School of Law Students of Color; (20) Latino Organizations; (21) the Association of American Medical Colleges; (22) the American Council on Education and 52 other Higher Education Organizations; (23) Graduate Management Admission Council and the Executive Leadership Council; (24) and (25) the NAACP Legal Defense and Educational Fund, Inc. and the American Civil Liberties Union (Feb. 14 and Feb. 19, 2003); (26) members and former members of the Pennsylvania General Assembly and Pennsylvania Civic Leaders; (27) the Michigan Black Law Alumni Society; (28) the School of Law of the University of North Carolina; (29) the Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Keweenaw Bay Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Ottawa Indians, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan, Nottawaseppi Huron Band of Potawatomi, Oneida Tribe of Indians of Wisconsin, Sault Ste. Marie Tribe of Chippewa Indians, and Michigan Indian; (30) the Students of Howard University School of Law; (31) a Committee of Concerned Black Graduates of ABA Accredited Law Schools; (32) National School Board Association, et al.; (33) American Federation of Labor and Congress of Industrial Organizations; (34) the Leadership Conference on Civil Rights and the LCCR Education Fund; (35) New York City Council, the Speaker, and individual members of the Council; (36) the States of Maryland, New York, Arizona, California, Colorado, Connecticut, Illinois, Iowa, Maine, Massachusetts, Minnesota, Montana, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Vermont, Washington, West Virginia, Wisconsin, and the Territory of the Virgin Islands; (37) Howard University; (38) Massachusetts Institute of Technology, Leland Stanford Junior University, E.I. Du Pont De Nemours, International Business Machines Corp., National Academy of Sciences, National Academy of Engineering, National Action Council for Minorities in Engineering; (39) the American Psychological Association; (40) Congressman John Conyers, Jr. and twelve other members of Congress; (41) 65 Leading American Businesses; (42) the University of Pittsburgh, Temple University, Wayne State University, and the University of Arizona; (43) City of Philadelphia, Pennsylvania, City of Cleveland, Ohio, and the National Conference of Black Mayors, Inc.; (44) Harvard University, Brown University, the University of Chicago, Dartmouth College, Duke University, the University of Pennsylvania, Princeton University, and Yale University; (45) the National Education Association et al.; (46) the National Urban League, the Southern Christian Leadership Conference of Los Angeles, and the National Rainbow/Push Coalition; (47) the New America Alliance; (48) the Social Scientists Glenn C. Loury, Nathan Glazer, John F. Kain, Douglas Massey, Marta Tienda, and Brian Bucks; (49) the United Negro College Fund and Kappa Alpha PSI;

Justices Stevens, Souter, Ginsburg, and Breyer joined Justice O'Connor's opinion. Only Justice Ginsburg wrote a concurring opinion, which dealt with the twenty-five-year limit the Court placed on its decision and called attention to the fact that placing a limit on race-conscious programs "accords with the international understanding of the office of affirmative action."<sup>65</sup> Chief Justice Rehnquist, joined by Justices Kennedy, Scalia, and Thomas, dissented on the ground that Michigan Law School's preferential admissions program "revealed . . . a naked effort to achieve racial balancing."<sup>66</sup> Justice Kennedy's dissenting opinion, which no other Justice joined, argued that the Court failed to scrutinize Michigan Law School's preferential admissions program to determine whether it took "account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual."<sup>67</sup> Instead, Justice Kennedy agreed with Chief Justice Rehnquist that "the concept of critical mass is a delusion used by the Law School to mask its attempt . . . to achieve numerical goals indistinguishable from quotas."<sup>68</sup>

Justice Scalia, joined by Justice Thomas, also wrote a dissenting opinion. He thought the Court's opinions in *Grutter* and *Gratz v. Bollinger*<sup>69</sup> seemed "perversely designed" to encourage future lawsuits.<sup>70</sup> One of these lawsuits

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(50) the Black Women Lawyers Association of Greater Chicago; (51) Media Companies; (52) Amherst, Bates, Bowdoin, Bryn Mawr, Carleton, Colby, Connecticut, Davidson, Franklin & Marshall, Hamilton, Hampshire, Haverford, Macalester, Middlebury, Mount Holyoke, Oberlin, Pomona, Sarah Lawrence, Smith, Swarthmore, Trinity, Vassar, Wellesley, and Williams Colleges and Colgate, Wesleyan, and Tufts Universities; (53) Carnegie Mellon University and 37 Fellow Private Colleges and Universities; (54) Human Rights Advocates and the University of Minnesota Human Rights Center; (55) Michigan Governor Jennifer M. Granholm; (56) the National Asian Pacific American Legal Consortium, Asian Law Caucus, Asian Pacific American Legal Center et al.; (57) the National Coalition of Blacks for Reparations in America (N'Cobra) and the National Conference of Black Lawyers (NCBL); (58) the State of New Jersey; (59) the American Jewish Committee, Central Conference of American Rabbis, Hadassah, National Conference for Community and Justice, National Council of Jewish Women, Progressive Jewish Alliance, Union of American Hebrew Congregations, and Women of Reform Judaism, the Federation of Temple Sisterhoods; (60) Columbia, Cornell, Georgetown, Rice, and Vanderbilt Universities; (61) Representative Richard A. Gephardt, et al.; and (62) the Hayden Family.

65. *Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring).

66. *Id.* at 379 (Rehnquist, C.J., dissenting).

67. *Id.* at 387 (Kennedy, J., dissenting).

68. *Id.* at 389.

69. *Gratz v. Bollinger*, 539 U.S. 244 (2003). In this case, the Supreme Court declared unconstitutional the University of Michigan's preferential affirmative action program for undergraduate admissions because it used a selection method under which

may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter*; and while the [Court's] opinion accords "a degree of deference to a university's academic decisions," . . . "deference does not imply abandonment or abdication of judicial review" . . . .)<sup>71</sup>

But the Court held that the issue of legislative fact that would determine the constitutionality of Michigan Law School's preferential admission policies was whether any educational benefits flow from a diverse student body. Given this holding, the Court was obligated to determine, independently, whether educational benefits flowed from a diverse student body, even if the parties did not raise the issue.

Justice Thomas also wrote a dissenting opinion, joined by Justice Scalia, in which he stated that "the Court relies heavily on social science evidence to justify its deference" to the law school's "conclusion that its racial experimentation leads to educational benefits"<sup>72</sup> and cited social science evidence to the contrary. His first reference is to a survey by Stanley Rothman, Seymour Martin Lipset, and Neil Nevitte,<sup>73</sup> which found:

[T]he greater the school's diversity, the less students were satisfied with their own educational experience. In addition, greater diversity was associated with perceptions of less academic effort among students and a poorer overall educational experience. Finally, enrollment diversity was positively related to students' experience of unfair treatment, even after the effects of all other variables were controlled. (As the proportion of black students grew, the incidence of these personal grievances increased among whites. Among blacks, however, there was no significant correlation. Thus diversity appears to increase complaints of unfair treatment among white students without reducing them among black students.)<sup>74</sup>

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every applicant from an underrepresented racial or ethnic minority group was automatically awarded twenty points of the one hundred needed to guarantee admission. This policy, the Court held, was not narrowly tailored to achieve educational diversity. Chief Justice Rehnquist wrote the Court's opinion, which was joined by Justices O'Connor, Scalia, Kennedy, and Thomas.

70. *Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part).

71. *Id.* at 348–49 (quoting *id.* at 328 (majority opinion); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

72. *Id.* at 364 (Thomas, J., concurring in part and dissenting in part).

73. *Id.* See generally Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Racial Diversity Reconsidered*, PUB. INT., Spring 2003, at 25. The authors compiled a sample totaling 1643 students, 1632 faculty members, and 808 administrators in 140 randomly selected universities and colleges in the United States. The sample excluded historically black colleges. The Angus Reid survey research firm conducted computer-assisted telephone interviews in the spring of 1999. Fifty-three percent of the students who were contacted responded, as did seventy-two percent of the faculty and seventy percent of the administrators. *Id.* at 30–31.

74. Rothman et al., *supra* note 73, at 36. "On the other hand, the association of diversity with more positive faculty perceptions of the treatment of minorities, and with both faculty and administrators' perceptions of less campus discrimination, held true." *Id.*



The survey of the faculty showed that “enrollment diversity was inversely related to faculty satisfaction with the quality of education, the work effort of the student body, and the academic readiness of students. The administrators’ judgments of student preparation and the quality of the educational experience were similar.”<sup>75</sup>

Citing studies by Lamont Flowers and Ernest T. Pascarella and by Walter R. Allen,<sup>76</sup> Justice Thomas then charged that the Court “never acknowledges . . . that racial (and other sorts) of heterogeneity actually impairs learning among black students.”<sup>77</sup> The Justice also “contest[ed] the notion that the Law School’s discrimination benefits those admitted as a result of it.”<sup>78</sup> He charged that the Court “spends considerable time discussing the impressive display of *amicus* support for the Law School in this case from all corners of society” but “nowhere in any of the filings in this Court is any evidence that the purported ‘beneficiaries’ of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences.”<sup>79</sup> To support this charge, Justice Thomas cited the work of Stephan and Abigail Thernstrom<sup>80</sup> and of Thomas Sowell.<sup>81</sup>

Justice Thomas concluded that while the beneficiaries of preferential admissions “may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less ‘elite’ law school for which they were better prepared.”<sup>82</sup> He attributed the need of Michigan

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75. *Id.*

76. *Grutter*, 539 U.S. at 364–65 (Thomas, J., concurring in part and dissenting in part); Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 35 (1992); Lamont Flowers & Ernest T. Pascarella, *Cognitive Effects of College Racial Composition on African American Students After 3 Years of College*, 40 J.C. STUDENT DEV. 669, 674 (1999); see also Louise Bohr et al., *Do Black Students Learn More at Historically Black or Predominantly White Colleges?*, 36 J.C. STUDENT DEV. 75, 77–79 (1995) (finding no significant reading, mathematics, or critical thinking test score difference between black students educated in two historically black colleges and those educated in sixteen predominantly white colleges).

77. *Grutter*, 539 U.S. at 364 (Thomas, J., concurring in part and dissenting in part).

78. *Id.* at 371.

79. *Id.*

80. *Id.*; Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1605–08 (1999).

81. *Grutter*, 539 U.S. at 372 (Thomas, J., concurring in part and dissenting in part); THOMAS SOWELL, *RACE AND CULTURE* 176–77 (1994).

82. *Grutter*, 539 U.S. at 372 (Thomas, J., concurring in part and dissenting in part).

Law School to discriminate on the basis of race and ethnicity to its refusal to abandon its “elitist admissions policy” and achieve the same racial and ethnic mix by accepting “all students who meet minimum qualifications.”<sup>83</sup> Justice Thomas did not refer to any of the fifteen amici curiae briefs that were filed in support of the petitioners who were denied admission to Michigan Law School.<sup>84</sup>

To perform their gatekeeping function under Federal Rule of Evidence 702 and come to independent conclusions about constitutional legislative facts that are in dispute, courts should be expected to take account of all the data that are available and material for a determination of these facts. Yet Justice O’Connor’s opinion made no mention of the studies relied upon by Justice Thomas or any of the amici curiae briefs that supported his position. Nor did Justice Thomas attempt to evaluate the methodology or conclusions of the social science studies relied upon by Justice O’Connor or any of the amici curiae briefs that supported the position of Michigan Law School. Each Justice was content with citing only the studies that supported his or her conclusions. But because the Court held that only the educational benefits flowing from a diverse student body could constitutionally justify Michigan Law School’s preferential racial and ethnic admissions policies, it was obligated to be as certain as possible that a diverse student body produced the claimed benefits. At a minimum, Justices O’Connor and Thomas should have acknowledged the existence of the social science data and analyses that failed to support their positions and explained why they rejected these data and analyses. Consideration of the conflicting data and analyses bearing upon whether student body diversity produces educational benefits for minority, as well as nonminority, students indicates how difficult a task was presented to the Supreme Court, both substantively and procedurally.<sup>85</sup>

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83. *Id.* at 350, 361–62, 354–56 n.4.

84. Briefs were filed by (1) the United States; (2) twenty-one law professors; (3) Ward Connerly; (4) the National Association of Scholars; (5) the Pacific Legal Foundation; (6) the Asian American Legal Foundation; (7) the Cato Institute; (8) the Center for Equal Opportunity, the Independent Women’s Forum, and the American Civil Rights Institute; (9) the Center for Individual Freedom; (10) the Claremont Institute Center for Constitutional Jurisprudence; (11) the Center for the Advancement of Capitalism; (12) the Michigan Association of Scholars; (13) the State of Florida and Governor John Ellis “Jeb” Bush; (14) the Reason Foundation; and (15) the Center for New Black Leadership.

At least six briefs were submitted supporting neither of the parties in *Grutter*, specifically those by (1) the Criminal Justice Legal Foundation; (2) the Massachusetts School of Law; (3) Exxon Mobil Corporation; (4) BP America Incorporated; (5) the Anti-Defamation League; and (6) the Equal Employment Advisory Council.

85. For the following delineation of the controversy, I am indebted, generally, to Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE

Justice O'Connor placed principal reliance upon William G. Bowen and Derek Bok's book<sup>86</sup> and the amicus curiae brief of the American Educational Research Association and others, which, in turn, relied upon the Expert Report of Professor Patricia Gurin. In the federal district court, Bowen testified for the University of Michigan in *Gratz*, Bok testified for the University of Michigan Law School in *Grutter*, and Gurin testified in both *Gratz* and *Grutter*.<sup>87</sup>

Bowen and Bok concluded that admission to selective undergraduate and professional schools "pays off handsomely for individuals of all races, from all backgrounds."<sup>88</sup> Black students who attended these schools were five times as likely as all black students nationwide to earn professional degrees or Ph.D.s. Approximately forty percent of the black students in the 1976 entering classes went on to obtain professional or doctoral degrees. The comparable figure for white students in these schools was thirty-seven percent and for all black college graduates, eight percent.<sup>89</sup> Blacks from elite colleges and universities were also far more likely than their white classmates to attend the most selective and prestigious law, medical, and business schools.<sup>90</sup>

Attendance at these institutions "conferred a considerable premium [earning appreciably more money than students with comparable academic achievement who attended less selective schools] . . . and

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& L. 625 (2006) and Russell K. Nieli, *The Changing Shape of the River: Affirmative Action and Recent Social Science Research*, ACAD. QUESTIONS, Fall 2004, at 7.

86. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998). Bowen and Bok

used the Andrew W. Mellon Foundation's College and Beyond [C & B] database to [survey black] students who had enrolled in 28 elite colleges and universities, 70% at one of 24 private universities, and the other 30% at one of four large public schools. . . . [S]tudents were surveyed first in 1976, and again in 1989 [about their] advanced degree attainment, employment, earnings, job satisfaction, civic participation, and views on race relations.

Lizotte, *supra* note 85, at 635.

The C & B database was "[c]reated on the explicit understanding that the Foundation would not release or publish data that identified either individual students or individual schools, it is a 'restricted access database.'" BOWEN & BOK, *supra*, at xxviii. This should have raised questions under Federal Rule of Evidence 702.

87. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (2001); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 822, 830 (2000).

88. BOWEN & BOK, *supra* note 86, at 276.

89. *Id.* at 98 fig.4.2.

90. *Id.* at 102 fig.4.4.

probably an especially high premium on black students.”<sup>91</sup> On average, black men earned \$38,200—or eighty-two percent—more than all black men with Bachelor of Arts (B.A.) degrees, and black women earned \$27,200—or seventy-three percent—more than all black women with B.A. degrees. The earnings advantage of white students attending selective institutions vis-à-vis all white holders of B.A.s was fifty-five percent for women and sixty-one percent for men.

Bowen and Bok hailed the success in college and later life of the black students who were the beneficiaries of the preferential admissions policies of the twenty-eight elite institutions.<sup>92</sup> These beneficiaries formed “the backbone of the emergent black and Hispanic middle class,” were active in civic affairs, and played leadership roles within the black community and the larger society.<sup>93</sup>

If preferential admissions were eliminated in schools of law and medicine, Bowen and Bok maintained, more than half of the existing minority student population would be excluded from these professions.<sup>94</sup> “Considering both the educational benefits of diversity and the need to include far larger numbers of black graduates in the top ranks of the business, professional, governmental, and not-for-profit institutions that shape our society,” they concluded that society would not be better off if preferential admissions were eliminated.<sup>95</sup>

In their review of the Bowen and Bok book cited by Justice Thomas, Abigail and Stephan Thernstrom sought to refute Bowen and Bok at every point. They attributed the success of black graduates of the twenty-eight elite institutions in gaining admission to graduate and professional schools to the fact that these schools also engaged in preferential admissions policies,<sup>96</sup> which Bowen and Bok acknowledged.<sup>97</sup>

Bowen and Bok also do not dispute that the beneficiaries of preferential admissions “underperform” in the classroom. “The average rank of black [1989] matriculants [in the twenty-eight elite institutions] was at the 23d percentile of the class, the average Hispanic student ranked in the 36th percentile, and the average white student ranked in the 53d percentile.”<sup>98</sup> They attribute these results to the minority matriculants’ “struggles to succeed academically in highly competitive academic

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91. *Id.* at 281.

92. *Id.*

93. *Id.* at 116.

94. *Id.* at 282.

95. *Id.* at 285.

96. Thernstrom & Thernstrom, *supra* note 80, at 1610.

97. BOWEN & BOK, *supra* note 86, at 116.

98. *Id.* at 72.

settings.”<sup>99</sup> Justice Thomas agreed and the Thernstroms elaborate this point. They cite the work of Linda F. Wightman, who reported that more than a fifth of the black law students who were the beneficiaries of preferential admissions failed to graduate and that disproportionate numbers of African American law graduates failed the bar examinations, which are graded on a color-blind basis.<sup>100</sup> Of the African American law graduates, twenty-seven percent

were unable to pass a bar exam within three years of graduation, a failure rate nearly triple that for African Americans who were admitted under regular standards and almost seven times the white failure rate. Fully 43% of the black students admitted to law school on the basis of race fell by the wayside, either dropping out without a degree or failing to pass a bar examination.<sup>101</sup>

The Thernstroms also challenge the Bowen and Bok claim that the beneficiaries of preferential affirmative action policies in the elite colleges and universities “are the backbone of the emergent black and Hispanic middle class.”<sup>102</sup> They say that *The Shape of the River* “does not contain a shred of evidence about the impact of preferential policies upon Hispanics” and estimate the number of African American beneficiaries at 4000—“a group too minuscule to form the ‘backbone’ of a black middle class that by any reasonable definition includes more than ten million people.”<sup>103</sup> Furthermore, the African American beneficiaries generally come from middle class black families.<sup>104</sup> Nor, they maintain, are Bowen and Bok correct in implying that preferential admissions to elite institutions are responsible for the advances of African Americans since World War II.<sup>105</sup> Very few of the increased number of African Americans in Congress, the federal government, the federal judiciary,

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99. *Id.*

100. Thernstrom & Thernstrom, *supra* note 80, at 1611–12; *see also* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 36 (1997). Wightman calculated that of the more than 27,000 students entering 163 American Bar Association (ABA) approved law schools in the fall of 1991, “only twenty-four African Americans would have been admitted to any of the top eighteen law schools if the decisions had been made purely on the basis of college grades and LSAT scores. But thanks to preferences, 420 black students got in, a stunning 17.5 times as many.” Thernstrom & Thernstrom, *supra* note 80, at 1610; *see also* Wightman, *supra*, at 30 tbl.6.

101. Thernstrom & Thernstrom, *supra* note 80, at 1612.

102. *Id.* at 1617 (quoting BOWEN & BOK, *supra* note 86, at 116).

103. *Id.* at 1617–18.

104. *Id.* at 1618.

105. *Id.*; *see* BOWEN & BOK, *supra* note 86, at 1–3.

the armed forces and academia, or of the recipients of the MacArthur Foundation “genius” awards, attended elite institutions.<sup>106</sup>

The Thernstroms also reject Bowen and Bok’s contention that preferential admissions are responsible for a cadre of African Americans who are making an indispensable contribution to civic and community endeavors. As Bowen and Bok concede, the rate (ninety percent) of the African American elite college students who participated in one or more civic activities is almost identical (eighty-seven percent) to that found in their survey of a nationally representative control group of matriculants at four-year colleges.<sup>107</sup>

Bowen and Bok also found that black students at elite schools tend to be somewhat more active than their white classmates, both as participants and as leaders, in one or more of thirteen types of civic activities.<sup>108</sup> The Thernstroms ask:

But how can we be sure they would have been any less active at a less selective college? The high level of participation Bowen and Bok discovered may simply reflect the fact that the admissions officers at the [elite] schools placed a heavy premium on prior organizational activity, particularly for minority applicants whose academic credentials were weaker.<sup>109</sup>

Bowen and Bok view the elite schools they studied as models for race relations they hope the larger society will emulate and claim that preferential admissions are essential to that mission. Their survey data, they maintain, “throw new light on the extent of interaction occurring on campuses today” and reveal “how positively the great majority of students regard opportunities to learn from those with different points of view, backgrounds, and experiences.”<sup>110</sup> As evidence, they report that fifty-six percent of the white students in their 1989 cohort said that they knew two or more black classmates “well” and that eighty-eight percent of blacks knew at least two white classmates “well.”<sup>111</sup>

The Thernstroms reply that eighty-six percent of all white adults in a 1997 national survey said they had black friends, and fifty-four percent of whites reported having five or more.<sup>112</sup> Nationally, seventy-three percent of whites surveyed in 1994 said that “they had ‘good friends’ who were African American. And the proportion of blacks with white friends is higher still on every one of these national surveys. The Bowen and Bok survey [according to the Thernstroms] suggests that the elite

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106. Thernstrom & Thernstrom, *supra* note 80, at 1619–20.

107. *Id.* at 1620; BOWEN & BOK, *supra* note 86, at 156–57.

108. BOWEN & BOK, *supra* note 86, at 157–58.

109. Thernstrom & Thernstrom, *supra* note 80, at 1621.

110. BOWEN & BOK, *supra* note 86, at 280.

111. *Id.* at 233 tbl.8.3.

112. Thernstrom & Thernstrom, *supra* note 80, at 1622.

campuses may be in the rear guard, not the vanguard.”<sup>113</sup> But are the two surveys comparable? There is a big difference between a student knowing someone in his or her class well and having friends of a different race.

Bowen and Bok report that former students at the elite institutions, both black and white, said they appreciated studying in a racially diverse environment and wished their colleges placed even more emphasis on racial diversity.<sup>114</sup> The Thernstroms think this is “hardly surprising” since administrations and much of the faculty at these schools have “strenuously celebrated” diversity on their campuses.<sup>115</sup> They also conclude that “given the prevailing campus climate, it is remarkable that enthusiasm for diversity was as limited as it turned out to be.”<sup>116</sup> To support their conclusion, the Thernstroms turned to the Bowen and Bok survey, which asked students in the elite institutions to rate the importance of the “ability to ‘work effectively and get along well with people of different races/cultures?’”<sup>117</sup> “Only 42% of the white students in the 1976 cohort and 55% of the 1989 group said, ‘very important,’ while the figure for blacks was 74% in 1976, 76% in 1989.”<sup>118</sup> The Thernstroms do not think these figures suggest that “elite campuses are a national race relations model.”<sup>119</sup> Bowen and Bok did not ask students who attended less selective schools to respond to the same question. Nor did they ask students in the elite institutions whether they approved or disapproved of preferential admissions.<sup>120</sup>

Bowen and Bok made much of the “considerable premium” enjoyed by both black and white students who attended elite institutions. The Thernstroms did not deal with this issue, but the work of Stephen Cole and Elinor Barber casts doubt on the Bowen and Bok assumption that this premium would disappear for black students if preferential admissions were abandoned.<sup>121</sup> Cole and Barber estimate that the

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113. *Id.*

114. BOWEN & BOK, *supra* note 86, at 247–48, 280.

115. Thernstrom & Thernstrom, *supra* note 80, at 1622.

116. *Id.*

117. *Id.*; BOWEN & BOK, *supra* note 86, at 224 tbl.8.1.

118. Thernstrom & Thernstrom, *supra* note 80, at 1622–23; BOWEN & BOK, *supra* note 86, at 224 tbl.8.1.

119. Thernstrom & Thernstrom, *supra* note 80, at 1623.

120. *Id.*

121. STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 206 (2003). This work was based on the results of an extensive questionnaire filled out by 7612 graduating

hundred most elite colleges and universities turn out about four percent of the 100,000 B.A. degrees received annually by black students, and more than 2500 four-year institutions turn out ninety-six percent.<sup>122</sup> “The data we present,” they write, “would . . . suggest that these 4,000 students would end up in higher-prestige occupations than they do under the current system of racial preferences in admissions.”<sup>123</sup> In coming to this conclusion, Cole and Barber accepted the fact that most of the studies by economists “show a small but significant positive effect on income of attending a prestigious school.”<sup>124</sup> But these same studies “also show that GPA has a small statistically significant negative effect on outcomes such as earnings—an effect that is usually at least as large as the effect of attending a highly selective school.”<sup>125</sup> And since “admissions policies employing racial preferences result in African Americans receiving lower GPAs than they might if they attended somewhat less selective schools, it seems to us that abandoning racial preferences would have little or no effect on outcomes such as income or prestige of occupation entered.”<sup>126</sup>

A study by economists Stacy Berg Dale and Alan B. Krueger<sup>127</sup> disputed *The Shape of the River*’s central contention on this issue: that attending an elite school has a significant positive effect on income—a contention Cole and Barber did not dispute. Dale and Krueger showed that what “may appear to be an independent school effect” may be “a simple reflection of the fact that people who attend the most selective colleges often have qualities [‘important personal motivational factors’ and other personal attributes] that . . . make them more likely to succeed financially and occupationally regardless of the institutions they attend.”<sup>128</sup> They found that students who attend more selective colleges do not earn more than other students who were accepted by the selective colleges but chose to attend less selective ones.<sup>129</sup>

Like Cole and Barber, Dale and Krueger found that black and Hispanic students attending elite institutions because of preferential

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seniors at thirty-four colleges and universities, most of which were considerably above the national norm in selectivity.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q.J. ECON. 1491, 1524 (2002).

128. Nieli, *supra* note 85, at 10; *see also* Dale & Krueger, *supra* note 127, at 1523–24.

129. Dale & Krueger, *supra* note 127, at 1523.



admissions do not do as well academically as their white and Asian classmates with the same SAT scores. Black and Hispanic students with the same SAT scores who attend less selective colleges earn relatively higher grades and attain higher rank in class than they do. “Employers and graduate schools may value their higher rank by enough to offset any other effect of attending a less selective college on earnings.”<sup>130</sup> These researchers, as well as the Thernstroms, attribute this “underperformance” of black and Hispanic students to the academic “mismatch” between them and their white and Asian classmates.<sup>131</sup> This is the explanation for “underperformance” accepted by Justice Thomas who also cited the work of Thomas Sowell in support of it.<sup>132</sup>

Bowen and Bok attack the mismatch theory by showing that the more selective the school, the greater the likelihood that black students in the school will graduate.<sup>133</sup> But the Thernstroms reply that it is hard to flunk out of the elite schools which practice grade inflation. According to Bowen and Bok’s 1989 sample, only 6.3% of the white students but 20.8% of the African American students failed to get a bachelor’s degree. And the racial difference in the dropout rate widened as the selectivity of the school increased—as the mismatch theory would suggest.<sup>134</sup>

Professors Claude M. Steele and Joshua Aronson attribute this underperformance to what they call “stereotype threat”<sup>135</sup> and other social scientists, “stereotype vulnerability.” They argue:

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130. *Id.* at 1512.

131. Thernstrom & Thernstrom, *supra* note 80, at 1601–02.

132. *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas, J., concurring in part and dissenting in part) (citing SOWELL, *supra* note 81, at 176–77).

133. BOWEN & BOK, *supra* note 86, at 61 fig.3.3.

134. Thernstrom & Thernstrom, *supra* note 80, at 1603–04.

135. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *THE BLACK-WHITE TEST SCORE GAP* 401, 401 (Christopher Jencks & Meredith Phillips eds., 1998); *see also* Elizabeth Rindskopf Parker & Sarah E. Redfield, *Law Schools Cannot Be Effective in Isolation*, 2005 BYU EDUC. & L.J. 1, 61 (using the term *stereotype vulnerability*).

African American students know that any faltering [on standardized tests] could cause them to be seen through the lens of a negative racial stereotype [about their intellectual ability as a group]. Those whose self-regard is predicated on high achievement—usually the stronger, more confident students—may feel this pressure so greatly that it disrupts and undermines their test performance.<sup>136</sup>

Stereotype threat “may interfere with performance in several ways” because the emotional arousal that accompanies it “can reduce the range of cues that students use to solve test problems. It can divert attention from the task at hand to irrelevant worries. It can also cause self-consciousness or overcautiousness.”<sup>137</sup> Cole and Barber conclude there is evidence to support Claude Steele’s theory.<sup>138</sup>

Although *The Shape of the River* provoked the most controversy, it did not deal directly with the educational benefits said to flow from student body diversity that provided Justice O’Connor’s constitutional justification for preferential racial and ethnic admissions. On the issue of educational benefits flowing from diversity, Justice O’Connor relied upon Professor Gurin’s Expert Report,<sup>139</sup> which was also the basis of the amicus brief submitted by the American Educational Research Association, the Association of American Colleges and Universities, and the American Association for Higher Education, which the Justice also cited in her opinion.

In her Expert Report, Professor Gurin analyzed (1) national data collected through the Cooperative Institutional Research Program (CIRP), which is conducted by the UCLA Higher Education Research Institute under the auspices of the American Council on Education;<sup>140</sup> (2) surveys by the Michigan Student Study (MSS);<sup>141</sup> and (3) a survey of

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136. Steele & Aronson, *supra* note 135, at 402.

137. *Id.* at 404.

138. COLE & BARBER, *supra* note 121, at 138.

139. See generally Expert Witness Report of Patricia Y. Gurin, *supra* note 45.

140. CIRP had 9316 students attending 184 colleges and universities complete questionnaires when they entered college in the summer and early fall of 1985 and follow-up questionnaires in 1989 and 1994 to assess their experiences since entering college. Historically black colleges and universities and community colleges were excluded from Professor Gurin’s analysis. Expert Witness Report of Patricia Y. Gurin, *supra* note 45, at app. C, available at <http://www.vpcomm.umich.edu/admissions/legal/expert/gurinapc.html>.

141. The MSS was a longitudinal series of surveys of the undergraduate class of 1994. All students received a questionnaire when they entered the University in September 1990. All students of color and a large representative sample of white students were followed up with questionnaires at the end of their first year, second year, and senior year of college. The data analyses presented in the Expert Report were based on the responses of 1134 white students and 187 African American students. The data on Latino students were not analyzed because their number at Michigan was not large enough to permit reliable results from the multivariate analyses undertaken. *Id.*

students [Gurin does not state how many] who entered the University of Michigan in 1990 and, as freshmen, took an introductory course in the Intergroup Relations, Community and Conflict Program (IGRCC).<sup>142</sup>

The “diversity” that the Court justified is what Professor Gurin and other social scientists refer to as “structural diversity”—the “numerical and proportional representation of students from different racial/ethnic groups in the student body.”<sup>143</sup> Gurin insists that structural diversity, by itself, usually is “not sufficient to produce substantial benefits.”<sup>144</sup> Yet it is essential because it makes possible “classroom diversity”—the incorporation into the curriculum of knowledge about diverse groups and interracial ethnic relationships and the opportunity of students from diverse backgrounds to learn about each other in the courses they take together—and “informal interactional diversity,” which is “the opportunity to interact with students from diverse backgrounds [on campus] . . . .”<sup>145</sup> Only classroom and interactional diversity, according to Gurin, produces educational benefits.<sup>146</sup>

Forty percent of Michigan’s African American students, thirty-five percent of its white students, and about twenty-five percent of its Asian American students indicated they had “quite a bit” or “a great deal” of

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142. An evaluation study followed these students for four years. All students in the program attended lectures, participated in discussion groups, wrote papers and exams, and engaged in a ten-week dialogue group designed to:

(1) help students discern and understand differences and similarities between the groups’ viewpoints on contested issues, (2) examine differences in viewpoint *within* each of the two groups in the dialogue, (3) help students identify and negotiate conflicts that arise in the dialogue, and (4) challenge the groups to find a basis for coalition and joint action on a specific issue.

*Id.* Students were surveyed first with students in the MSS study, again after the IGRCC program was completed, and three years later at graduation. The study utilized a matched-sample control group of students who had not enrolled in the IGRCC program. *Id.*

143. Jeffrey F. Milem, *The Educational Benefits Of Diversity: Evidence From Multiple Sectors*, in COMPELLING INTEREST: EXAMINING THE EVIDENCE OF RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES 126, 132 (Mitchell J. Chang et al. eds., 2003). Milem describes a second type of diversity as “*diversity-related initiatives* (i.e., cultural awareness workshops, ethnic studies courses, and so forth) that occur on college and university campuses,” even those that are not structurally diverse. *Id.* He describes a third type of diversity as “*diverse interactions*” that are “characterized by students’ exchanges with racially and ethnically diverse people as well as diverse ideas, information, and experiences.” *Id.*

144. Expert Witness Report of Patricia Y. Gurin, *supra* note 45, at 377.

145. *Id.* at 376.

146. *Id.* at 376–77.

exposure to diversity content in their courses.<sup>147</sup> Forty percent of Michigan's white students indicated having "substantial" interaction with Asian American students and another forty percent indicated having "some" interaction. Twenty percent of the white students indicated having "substantial" interaction with African American students and another forty-five percent indicated having "some" interaction.<sup>148</sup> Ninety-one percent of the Latino students, eighty-six percent of the Asian American students, and fifty percent of the African American students indicated "substantial" interactions with white students.<sup>149</sup>

Describing the nature of these interactions, thirty-nine percent of the white students said they "studied together" with Latino students "quite a bit" or "a great deal" and sixty-eight percent said they "shared personal feelings and problems" in these relationships. The comparable percentages of white student interactions with Asian American students were thirty-eight percent and forty-nine percent, respectively, and with African American students, fourteen percent and twenty-nine percent, respectively. Only four percent of the white students said they "had tense, somewhat hostile interactions" with African American students, and only one percent said these relationships were "guarded and cautious."

Seventy-three percent of the Latino students, sixty-seven percent of the Asian American students, and twenty-six percent of the African American students said they "studied together" with white students "quite a bit" or "a great deal"; eighty-five percent of the Latino students, seventy percent of the Asian American students, and twenty-five percent of the African American students, said they "shared personal feelings and problems" in these relationships.<sup>150</sup> Twenty-three percent of the African American students said their relationships with white students were "guarded and cautious," and fifteen percent indicated that they were "tense, somewhat hostile."<sup>151</sup>

The proportion of white students who had at least one close friend of color among their six best friends increased from thirty-two percent at the time they entered the University of Michigan to forty-six percent four years later. African American students with at least one close friend who was not African American increased from forty-seven percent at time of entrance to fifty-four percent when they were seniors.<sup>152</sup>

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147. Expert Witness Report of Patricia Y. Gurin, *supra* note 45, at app. E, available at <http://www.vpcomm.umich.edu/admissions/legal/expert/gurinape.html>.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

On the basis of these data, Gurin concluded that the University of Michigan, which was structurally diverse with about twenty-five percent minority enrollment, “is one of those institutions that has created opportunities in classes and in the informal student environment for structural diversity to affect student learning and preparation for participation in a democratic society.”<sup>153</sup> Gurin found “[s]tudents who had experienced the most diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.”<sup>154</sup> They employed “conscious, effortful, deep thinking,” in contrast to thinking that is preconditioned or stereotyped, thus enabling them to better understand others’ perspectives and manage conflicts. The results showed:

White students with the most experience with diversity during college demonstrated the greatest growth in active thinking processes as indicated by increased scores on the measures of complex thinking and social/historical thinking . . . ; growth in motivation in terms of drive to achieve, intellectual self-confidence, goals for creating original works . . . ; the highest post-graduate degree aspirations . . . ; and the greatest growth in . . . values [students] placed on their intellectual and academic skills . . . .<sup>155</sup>

These results persisted over time.

Five years into the post-college world, white graduates who had experienced the greatest classroom diversity and informal interactional diversity during college still demonstrated the strongest academic motivation and the greatest growth in learning . . . . They also placed greater value than other white graduates on intellectual and academic skills as part of their post-college lives . . . .<sup>156</sup>

The results from the Michigan Student Society show that it is the quality of cross-racial interaction that “affects white students’ growth in active thinking and their graduate school intentions.”<sup>157</sup>

On the basis of the CIRP data, Gurin found that attending a structurally diverse college resulted in more diverse friends, neighbors, and work associates nine years after college entry.<sup>158</sup> White students raised in predominantly white neighborhoods “who attended colleges with 25 percent or more minority enrollment, as contrasted to white students who

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153. Expert Witness Report of Patricia Y. Gurin, *supra* note 45, at 377.

154. *Id.* at 388.

155. *Id.* at 389.

156. *Id.*

157. *Id.*

158. *Id.* at 385.

attended colleges with very low minority enrollment, were much more likely to have diverse friendships after leaving college and to live in diverse neighborhoods and work in settings where co-workers were diverse.”<sup>159</sup> Moreover, due to the networking they were able to do in structurally diverse schools, previously segregated minority students in such schools were “more likely to find themselves in desegregated employment and to work in white-collar and professional jobs in the private sector.”<sup>160</sup>

Students who had attended diverse colleges were also better prepared to participate in a democratic society. Gurin described these “democracy outcomes” as follows:

Education plays a foundational role in a democracy by equipping students for meaningful participation. Students educated in diverse settings are more motivated and better able to participate in an increasingly heterogeneous and complex democracy. They are better able to understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of the common good. Students can best develop a capacity to understand the ideas and feelings of others in an environment characterized by the presence of diverse others, equality among peers, and discussion under rules of civil discourse. These factors are present on a campus with a racially diverse student body.

. . . Students who experienced diversity in classroom settings and in informal interactions showed the most engagement during college in various forms of citizenship, and the most engagement with people from different races and cultures. . . . These effects continued after the students left the university setting. Diversity experiences during college had impressive effects on the extent to which graduates in the [CIRP] national study were living racially and ethnically integrated lives in the post-college world. Students with the most diversity experiences during college had the most cross-racial interactions five years after leaving college.<sup>161</sup>

Justice O’Connor cited two other works which, on the whole, support Professor Gurin’s Expert Report.<sup>162</sup> Professor Mitchell J. Chang’s study showed that structural diversity is “a significant, though not strong, positive predictor of students’ likelihood of forming interracial friendships and talking about race and ethnicity.”<sup>163</sup> Socializing with

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159. *Id.* at 386.

160. *Id.*

161. *Id.* at 365–66.

162. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (Gary Orfield & Michal Kurlaender eds., 2001); *COMPELLING INTEREST*, *supra* note 143).

163. Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, in *DIVERSITY CHALLENGED*, *supra* note 162, at 175, 181. Professor Chang analyzed a 1985 survey completed by 192,453 first-time, full-time freshmen at 365 colleges and universities and a 1989 survey of a sample of the 1985 respondents completed by 18,188 students attending 392 colleges and universities to ascertain

someone of another racial group and talking about racial issues were positively related to academic and personal development—to earning a bachelor's or higher degree, intellectual self-confidence, social self-confidence, and overall satisfaction with college. Professor Chang acknowledged that the statistical correlations found in his study were relatively small, but insisted they were significant, “not simply in the mathematical sense but also because they exist at all,” in refutation of the critics of preferential affirmative action.

Professor Sylvia Hurtado's analysis<sup>164</sup> concluded that “[p]erhaps the most compelling argument for a diverse student body rests on evidence showing that interaction across racial/ethnic groups, particularly of an academic nature, is associated with important outcomes [including improvement in critical thinking and problem-solving skills] that will prepare students for living in a complex and diverse society.”<sup>165</sup> Professor Jeffrey F. Milem found that the institutions that “made the most progress in increasing the enrollment of minority students—the selective research universities—are in many respects the least flexible and least adaptive in responding to changing student needs. These institutions are dominated by faculty oriented to specialized research, not to flexible approaches to teaching.”<sup>166</sup> He agreed with Professor Gurin that “simply admitting more minority students does not produce the substantial changes in teaching approaches or content necessary to realize the full benefits of diversity. Such changes do take place, however, where there is increased faculty diversity and leadership that alters the campus climate.”<sup>167</sup> So the failure of an institution to adapt to the needs

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whether student socialization with someone of a different race and discussion of racial issues were a function of racial and ethnic diversity on campus. *Id.* at 177.

164. Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in DIVERSITY CHALLENGED, *supra* note 162, at 187, 187. Professor Hurtado analyzed the self-reported experiences of a random national sample of approximately 4250 students attending 309 four-year predominantly white colleges and universities in the late 1980s to the early 1990s, and data from the 1989–1990 Faculty Survey administered by UCLA's Higher Education Research Institute, composed of responses from over 16,000 faculty at 159 medium and highly selective predominantly white institutions across the United States. *Id.* at 192.

165. *Id.* at 199–200.

166. Jeffrey F. Milem, *Increasing Diversity Benefits: How Campus Climate and Teaching Methods Affect Student Outcomes*, in DIVERSITY CHALLENGED, *supra* note 162, at 233, 234.

167. *Id.* at 234. The campus climate is formed by:

of the minority students, not preferential affirmative action, should be blamed if student body diversity does not produce the expected educational benefits.

Professor Milem also reviewed the literature dealing with the educational benefits of structural diversity in the third book cited by Justice O'Connor.<sup>168</sup> Milem concluded that current research supports the view that diversity benefits all students by enhancing their critical and complex thinking ability, attaining higher levels of social and historical thinking, enhancing ability to understand diverse perspectives, improving openness to diversity and challenge, enhancing classroom discussions, producing greater satisfaction with their college experience, attaining higher levels of student persistence, improving racial and cultural awareness, producing greater commitment to increasing racial understanding, perceiving a more supportive campus racial climate, and increasing income of those who graduate from higher institutions of “quality.”<sup>169</sup>

Current research, according to Milem, also supports the conclusion that diversity produces more student-centered approaches to teaching and learning, more diverse curricular offerings, more research focused on issues of race, ethnicity, and gender, and more involvement in community and volunteer service on the part of women faculty and faculty of color.

Of all the studies referred to by the Court in support of its conclusions in *Grutter*, only three principal works dealt with law students and law schools. The first was the amicus brief of the Association of American Law Schools, which showed that law schools, especially the elite schools, trained the nation’s leaders.<sup>170</sup> The second, a study by Professors Gary Orfield and Dean Whitla, explored the educational impact of student diversity in Harvard Law School and the University of Michigan Law School and supported the findings of Professor Gurin’s Expert Report.<sup>171</sup> The third, a study by Professors Richard Lempert, David

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1) an institution’s historical legacy of inclusion or exclusion of various racial or ethnic groups; 2) structural diversity, or the numerical and proportional representation of diverse groups on campus; 3) the psychological climate, including perceptions and attitudes between groups; and 4) the behavioral climate, or nature of intergroup relations on campus.

*Id.*

168. Milem, *supra* note 143, at 126.

169. *Id.* at 130.

170. See *supra* note 61 and accompanying text.

171. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *DIVERSITY CHALLENGED*, *supra* note 162, at 143, 154. Their data consisted of the responses of 1820 students at Harvard and Michigan to a survey administered by the Gallup Poll.



Chambers, and Terry Adams,<sup>172</sup> surveyed more than two thousand Michigan Law School alumni, half of whom were minorities, who had graduated between 1970 and 1996. Their conclusions also supported the findings of *The Shape of the River* and Professor Gurin's Expert Report.

Two-thirds of the students surveyed by Orfield and Whitley were white. Fifty-five percent of the Harvard students and sixty percent of the Michigan students reported high levels of interracial contact.<sup>173</sup> About one-third of the students in the two schools said they studied together with students of a different race or ethnicity "often" or "fairly often."<sup>174</sup> More than two-thirds of the students in each school thought diversity led to an enhancement of their thinking about problems and solutions and the way topics were discussed inside and outside their classes, and of their ability to work effectively and get along with members of other races.<sup>175</sup>

Approximately ninety-two percent of the Harvard students and almost ninety-four percent of the Michigan students said that discussions with students of different racial and ethnic backgrounds changed their views of conditions in various social and economic institutions.<sup>176</sup> Equally large percentages said that such discussions changed their views of civil rights and the kind of legal or community issues they will encounter as professionals.<sup>177</sup>

Students were asked to compare their classes that were attended by members of one race only with their classes that were racially or ethnically diverse, with respect to the variety of subjects and examples considered, the level of intellectual challenge, and the seriousness with which alternative perspectives were discussed. Among the students who attended both types of classes, those who stated that the diverse classes were superior in these respects outnumbered by more than ten to one those who stated that the single-race classes were superior. But the percentage perceiving no difference in the level of intellectual challenge

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172. Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000).

173. Orfield & Whitley, *supra* note 171, at 158.

174. *Id.*

175. *Id.* at 159.

176. *Id.* at 164–65.

177. *Id.* at 165–66.

between the two types of classes (36.8%) was slightly greater than the percentage finding the diverse classes superior in this respect (34.4%).<sup>178</sup>

Finally, students were asked: “Do you consider having students of different races and ethnicities to be a positive or negative element of your educational experience?”<sup>179</sup> Approximately ninety percent of the Harvard and Michigan students replied that diversity was a positive element in their total educational experience.<sup>180</sup> Rothman, Lipset, and Nevitte maintain that this last question asked by Orfield and Whitley is worded in a way that taps into issues on which almost everyone agrees.<sup>181</sup> “[A]lmost everyone approves of [diversity] in the abstract, but its application in concrete situations can produce great controversy.”<sup>182</sup>

The Lempert, Chambers, and Adams survey concluded:

Perhaps the core finding of our study is that Michigan’s minority alumni, who enter law school with lower LSAT scores and UGPAs than its white alumni and receive, on average, lower grades in law school than their white counterparts, appear highly successful—fully as successful as Michigan’s white alumni—when success is measured by self-reported career satisfaction or contributions to the community. Controlling for gender and career length, they are also as successful when success is measured by income.<sup>183</sup>

They found that large proportions of alumni placed considerable value on the contribution diversity made to their classroom experiences. Nearly twice as many white male alumni who graduated in the 1990s, when student body diversity was increasing, responded positively to diversity than white males graduating in each of the previous two decades. They also found that minority alumni were more likely than other alumni to engage in government and public interest work and to serve individuals of their own race or ethnicity.

A survey of 500 law school faculty conducted by the American Association of Law Schools (AALS) in 1999 was also available to the Court.<sup>184</sup> The AALS found that faculty supported structural diversity because it broadened the variety of experiences shared in the classroom and helped students to confront racial stereotypes. Nearly seventy-five

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178. *Id.* at 166–67.

179. *Id.* at 161.

180. *Id.* at 160–61.

181. Rothman et al., *supra* note 73, at 30.

182. *Id.*

183. Lempert et al., *supra* note 172, at 496–97.

184. The results of the AALS survey were set forth in the amicus brief submitted by the American Educational Research Association and others, which was cited by Justice O’Connor in *Grutter*. Brief of the American Educational Research Ass’n et al. as Amici Curiae in Support of Respondents at 19, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

percent of the faculty, AALS reported, felt strongly that having a diverse student body is important to their law schools' mission.<sup>185</sup>

Subsequent to the decision in *Grutter*, Richard H. Sander, Professor of Law at UCLA and a Ph.D. in economics, published a study of the effects of preferential admissions programs in law schools nationally on African Americans seeking to enter the legal profession.<sup>186</sup> Using a 1000-point scale that gave 400 points for a perfect undergraduate GPA and 600 points for a perfect LSAT score, Professor Sander found that at the fourteen most elite law schools, white students had a median score of 875 (equivalent to, for example, an undergraduate GPA of 3.75 and an LSAT score of 170) while black students had a median score of 705 (equivalent to, for example, an undergraduate GPA of 3.05 and an LSAT score of 160). The median black score was 2.3 standard deviations below the median white score.

Preferential admissions to the elite law schools, Sander asserts, forces all other law schools to follow the same practice if they wish, as they do, to enroll any black students. Sander explains:

Affirmative action . . . has a cascading effect through American legal education. The use of large boosts for black applicants at the top law schools means that the highest-scoring blacks are almost entirely absorbed by the highest tier. Schools in the next tier have no choice but to either enroll very few blacks or use racial boosts or segregated admissions tracks to the same degree as the top-tier schools. The same pattern continues all the way down the hierarchy.

. . . At the bulk of law schools, the very large preferences granted to blacks only exist in order to offset the effects of preferences used by higher-ranked schools.

. . . .

. . . The result is a game of musical chairs where blacks are consistently bumped up several seats in the law school hierarchy, producing a large black-white gap in the academic credentials of students at nearly all law schools.<sup>187</sup>

Supporting the contentions of the Thernstroms, Cole and Barber, Dale and Krueger, and Thomas Sowell, Sander shows that the “cascading effect” of preferential admissions of blacks puts many of them in academic environments that are too competitive for them. The Law

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185. *Id.*

186. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 369 (2004). Professor Sander analyzed several large databases, including the Bar Passage Study (BPS) compiled from 1991 to 1997 by the Law School Admissions Council. These data track the progress of more than 27,000 students from when they entered law school in 1991 until 1997. *Id.* at 414–15.

187. *Id.* at 416–19.

School Admissions Council-Bar Passage Study (LSAC-BPS) data revealed that at the top tier of law schools, fifty-two percent of blacks, compared to six percent of whites, had first year grades that placed them in the bottom ten percent of the grade distribution, and only eight percent of the blacks placed in the top half of their class. The median African American student at these schools received the same first year grades as the fifth or sixth percentile white student.

In the second, third, fourth, and fifth groups of law schools identified in the LSAC-BPS data, the patterns of black performance were similar:

Generally, around fifty percent of black students are in the bottom tenth of the class, and around two-thirds of black students are in the bottom fifth. . . . Only in Group 6, made up of the seven historically minority law schools, is the credentials gap, and the performance gap, much smaller.<sup>188</sup>

At the 163 law schools surveyed, Professor Sander found that the median black GPA at the end of the first year was equivalent to those of whites at the seventh or eighth percentile, that is, about ninety-two percent of white students did better than the median black student. And the black students do not tend to catch up with the white students in the second and third years of law school. “In relative terms, the grades of black law students actually go down a little from the first to the third year.”<sup>189</sup>

As a result, the attrition rate of black students is more than twice that of whites: 19.2% of blacks failed to graduate after five years in law school as compared to 8.2% of whites.<sup>190</sup> Black students who graduate face the bar exam, the final hurdle to entry into the legal profession. Sander reports:

Of all the black students in the LSAC-BPS study who began law school in 1991, only 45% graduated from law school, took the bar, and passed on their first attempt. The rate for whites was over 78%. After multiple attempts, 57% of the original black cohort become lawyers. But this still means that 43% of the black students starting out never became lawyers, and over a fifth of those who did become lawyers failed the bar at least once.<sup>191</sup>

Sander also attributes the poor performance of African Americans to the “academic mismatch” experienced by them because racial preferences enable them to attend higher-ranked schools than their academic credentials would warrant—a mismatch that affects their ability to learn.<sup>192</sup>

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188. *Id.* at 430.

189. *Id.* at 436.

190. *Id.*

191. *Id.* at 454.

192. *Id.* at 443, 446, 450.

Sander is engaged in a project known as “After the J.D.” (AJD), which is attempting to track approximately ten percent of those who became lawyers in the year 2000 through the first ten years of their careers. The first fruits of the project are detailed survey data on more than 4000 attorneys in their second or third year of practice after law school—a broadly representative sample of the entire national population of young lawyers. Sander used these data to answer a question of great importance to Bowen and Bok in *The Shape of the River* and to Lempert, Chambers, and Adams in *The River Runs Through Law School*: How are the earnings, extent of career satisfaction, and contributions to the community of black lawyers affected by the fact they attended law schools of high prestige but graduate with lower grades?

According to the AJD data, the “most statistically reliable predictor of earnings variation” in private firms is the “region” variable.<sup>193</sup> Young lawyers working in New York earn more than those working in Washington, Los Angeles, or Chicago. The second most powerful predictor of earnings is law school grades. School prestige is a distant third.<sup>194</sup> The data show an association between school prestige and income, but “in all schools outside the top ten, there is a large market penalty for being in or near the bottom of the class.”<sup>195</sup> Sander’s analysis leads him to conclude that

the effect of racial preferences in law school admissions for black students upon their job market outcomes is overwhelmingly negative for blacks in middle- and lower-ranked schools. It is a smaller penalty for students at schools near the top of the status hierarchy, and it is nearly a wash—perhaps even a small plus—for students at top-ten schools. But nowhere do I find that the prestige benefits of affirmative action dominate the costs stemming from lower GPA.<sup>196</sup>

Furthermore, Sander shows that his estimates understate the importance of GPA.<sup>197</sup> He maintains that the “absence of preferences would greatly increase the supply of blacks with high grades—the students both elite

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193. *Id.* at 458.

194. *Id.* at 459.

195. *Id.* at 460. Refining his analysis, Sander shows that alumni of Tier 1 schools earn 29.6% to 40.4% more than alumni of the lowest-status schools. Alumni of Tier 2 schools earn 16.1% to 26.6% more than alumni in the lowest-status schools. Furthermore, “[t]here is no measurable earnings dividend from attending a more prestigious school in the bottom half of the law school distribution.” *Id.* at 465.

196. *Id.* at 466.

197. *Id.*

and ordinary employers are obviously seeking out most vigorously.”<sup>198</sup> In these respects, Sander’s findings corroborate those of Dale and Krueger.<sup>199</sup>

Sander considers other effects of ending preferential admissions and examines the brief in *Grutter* filed by LSAC claiming that as many as ninety percent of black applicants in 1990 to 1991 would not have been admitted to any nationally-accredited law school in the United States if grades and test scores were the sole admissions criteria. Sander thinks this claim is “ridiculous.”<sup>200</sup> Black applicants, he maintains, are aware of the existence of preferential affirmative action policies and apply to higher prestige schools than they otherwise might in expectation of preference. Sander does not dispute that “[i]f racial preferences suddenly disappeared and black applicants continued to apply to the same schools as they do now, then of course they would be rejected at a very high rate.”<sup>201</sup> But if blacks applied to schools in the same manner as whites, that is, without expectation of preferential admission, and if law schools evaluated them in the same way they evaluated whites, Sander maintains the results would not be those predicted by LSAC.

To support his contention, Sander refers to Professor Linda Wightman’s study of the applicants to the class entering law school for the 2000–2001 school year, which concluded that under a race-blind regime, the number of blacks receiving at least one offer of admission from an ABA-approved law school would have declined by only fourteen percent.<sup>202</sup> Professor Wightman’s study of the applicants had shown that race-blind admissions would have resulted in “reducing the number of admitted black applicants to approximately a third of what it was in the 1990–1991 application year.”<sup>203</sup> The difference between 1991 and 2001, Sander shows, was due in part to an increase in the ratio of black applicants to white applicants—one black for every 6.5 whites—and the slight improvement of the academic credentials of blacks relative to those of whites.<sup>204</sup> Without preferential admissions, Sander estimates, roughly eighty-six percent of black applicants would gain entry to some law school in which they would be competitive with all other students and their “grades, graduation rates, and bar passage rates would all

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198. *Id.* at 468.

199. *See* Dale & Krueger, *supra* note 127, at 1523.

200. Sander, *supra* note 186, at 469.

201. *Id.*

202. *Id.* at 472; Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data*, 53 J. LEGAL EDUC. 229, 237 (2003).

203. Wightman, *supra* note 100, at 15–16.

204. Sander, *supra* note 186, at 471–72.

converge toward white students' rates. The overall rate of blacks graduating from law school and passing the bar on their first attempt would rise from the 45% measured by the LSAC-BPS study to somewhere between 64% and 70%.”<sup>205</sup> The production of black lawyers would rise significantly.

Under a race-blind system, the fourteen percent of blacks who would not gain entry into some law school have, currently, very small chances of graduating from law school and passing the bar exam. They add “only a comparative handful of attorneys to total national production.”<sup>206</sup> The percentage of blacks in the most prestigious schools, however, would drop precipitously to one or two percent of the student body, but the schools below the top would benefit greatly from having better qualified black students.<sup>207</sup>

Sander reaches these conclusions on the assumption that the current standards of admission for whites would be the standards for all applicants, regardless of race or ethnic origin. Bowen and Bok seriously suggested that if colleges and universities were forbidden to take race into account, they would lower admission standards across the board in order to obtain the desired number of African Americans and Hispanics.<sup>208</sup> While deploring that Bowen and Bok would choose to lower intellectual standards rather than maintain current standards and abandon preferential racial and ethnic admissions, the Thernstroms thought this alternative could work. “Setting the admissions bar very low,” they wrote, “and then accepting students more or less randomly from a very large pool defined as qualified will yield the desired racial mix.”<sup>209</sup> Justice Thomas favored this alternative; but Sander demonstrates that it will not work. He explains that if, for example, University of Michigan Law School admitted all applicants with academic scores equal to those attained by its black students, its first year enrollment would increase from 350 to about 1500 students. But because the standards for the admission of blacks would remain the same, black enrollment would stay a little above twenty and the percentage of first-year black students would fall from seven percent to 1.4%.<sup>210</sup> The school might introduce a lottery to control class size, but, if it were color-blind, the black presence would still be only 1.4%.

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205. *Id.* at 474.

206. *Id.*

207. *Id.* at 483.

208. BOWEN & BOK, *supra* note 86, at 288–89.

209. Thernstrom & Thernstrom, *supra* note 80, at 1631.

210. Sander, *supra* note 186, at 417.

Sander does not confront the issue whether educational benefits flow from student body racial and ethnic diversity. Although the Court upheld the constitutionality of Michigan Law School's preferential admissions policy because of these educational benefits, Sander's analysis is intended to strike at the premise underlying this holding—that "racial preferences are indispensable to keep a reasonable number of blacks entering the law and reaching its highest ranks—a goal which is in turn indispensable to a legitimate and moral social system."<sup>211</sup> In truth, Sander insists, black law students "are the victims of law school programs of affirmative action, not the beneficiaries."<sup>212</sup> The actual outcome of preferential affirmative action cannot be reconciled with its claimed educational benefits.

Would Professor Sander's analysis and supporting data—new legislative facts—be admissible in a new case that asked the Supreme Court to reconsider its decision in *Grutter v. Bollinger*? This issue arose in *Stell v. Savannah-Chatham County Board of Education*, in which the District Court admitted evidence intended to show that the Supreme Court was wrong to conclude in *Brown v. Board of Education* that the separate schooling of black and white children caused psychological injury to black children and that a dual school system was "more favorable to the children involved in a psychological sense, avoid[ed] the injurious conflict arising from loss of racial identity, and result[ed] in a more successful educational program for the students of both races."<sup>213</sup> Because the district court found this evidence to have "somewhat stronger indicia of truth than that on which the findings of potential injury were made in *Brown*,"<sup>214</sup> it entered judgment dismissing a class action suit to enjoin the Savannah-Chatham County Board of Education from operating a biracial school system.

The Fifth Circuit overruled the district court's decision and held it was bound by *Brown*. "[N]o inferior federal court may refrain from acting as required by that decision even if such a court should conclude that the Supreme Court erred either as to its facts or as to the law."<sup>215</sup> The Fifth Circuit did not read *Brown* "as being limited to the facts of the cases there presented" but "as proscribing segregation in the public education

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211. *Id.* at 481.

212. *Id.*

213. *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F. Supp. 667, 679 (S.D. Ga. 1963).

214. *Id.* at 680.

215. *Stell v. Savannah-Chatham County Bd. of Educ.*, 333 F.2d 55, 61 (5th Cir. 1964).



process on the stated ground that separate but equal schools for the races were inherently unequal.”<sup>216</sup>

This conclusion is confusing. The Fifth Circuit may be saying that segregated schools are “inherently unequal” for reasons other than their harmful effect upon black school children. Evidence that they are not harmful would then not be material to the issue of constitutionality; but the Fifth Circuit did not explain what it meant by “inherently unequal.” If it agreed that segregated schooling is inherently unequal because of its deleterious effect upon school children, then the truth of that legislative fact must always be open to question because it is determinative of constitutionality. This does not mean that the decision of the district court was correct. Unless a lower court has very good reason to anticipate that the Supreme Court will overrule a decision, it must abide by that decision. At the same time, the district court should have conducted an evidentiary hearing on the legislative fact issue to create a record to facilitate the Supreme Court’s reconsideration of the case.

Justice Blackmun, concurring in *United States v. Leon*,<sup>217</sup> and Justice Souter, concurring in *Washington v. Glucksberg*,<sup>218</sup> took the position for which I am contending. In *Leon*, Justice Blackmun wrote:

[A]ny empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.

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216. *Id.*

217. 468 U.S. 897, 927 (1984) (Blackmun, J., concurring). The Court in this case decided that the Fourth Amendment exclusionary rule did not bar the admission of evidence seized in reasonable, good faith reliance on a search warrant that was subsequently held to be defective. In coming to this conclusion, the Court engaged in a cost-benefit analysis that found “the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.” *Id.* at 922 (majority opinion).

218. 521 U.S. 702, 781 (1997) (Souter, J., concurring).

If a single principle may be drawn from this Court's exclusionary rule decisions, . . . it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom.<sup>219</sup>

Justice Souter concurred in *Glucksberg* because he concluded that the Washington statute banning assisted suicide was justified by the state's interests to protect terminally ill patients "from mistakenly and involuntarily deciding to end their lives" and to guard against "both voluntary and involuntary euthanasia."<sup>220</sup> Justice Souter noted that the Netherlands was "the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence about how" the guidelines issued for the medical profession affected actual practice.<sup>221</sup> But, he found, there is "a substantial dispute today about what the Dutch experience shows."<sup>222</sup>

Since there is little experience directly bearing on the issue, the most that can be said is that whichever way the Court might rule today, events could overtake its assumptions, as experimentation in some jurisdictions [like Oregon which legalized assisted suicide]<sup>223</sup> confirmed or discredited the concerns about progression from assisted suicide to euthanasia.<sup>224</sup>

Justice Souter concluded: "While I do not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time."<sup>225</sup> Nowhere in his opinion did Justice Souter use the term *legislative facts*.

Justices Blackmun and Souter agreed that the legislative facts that are constitutionally significant should always be open to question. And, I would add, the Court must independently determine what they are—even if the data, analyses, and opinions of social scientists about them are in conflict. The Supreme Court and lower federal courts need help to resolve such conflicts and make the required independent determinations of legislative facts. Agreeing with the decision reached in *Daubert*, Justice Breyer urged trial courts to appoint experts to assist them in performing their gatekeeping function with respect to the admissibility of scientific evidence under Federal Rule of Evidence 702.<sup>226</sup> The

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219. *Leon*, 468 U.S. at 928 (Blackmun, J., concurring).

220. *Glucksberg*, 521 U.S. at 782 (Souter, J., concurring).

221. *Id.* at 785.

222. *Id.* at 786.

223. *See generally* *Gonzales v. Oregon*, 546 U.S. 243 (2006) (describing Oregon's physician-assisted suicide law).

224. *Glucksberg*, 521 U.S. at 787 (Souter, J., concurring). *See generally* *Gonzales v. Oregon*, 546 U.S. 243 (2006) (describing Oregon's physician-assisted suicide law).

225. *Glucksberg*, 521 U.S. at 789 (Souter, J., concurring).

226. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 147–150 (1997) (Breyer, J., concurring);

courts will also need expert assistance in dealing with nonscientific “technical and other specialized knowledge” in the domain of the social and behavioral sciences. In his concurring opinion in *United States v. Leon*, Justice Blackmun also acknowledged that “[l]ike all courts, we face institutional limitations on our ability to gather information about ‘legislative facts.’”<sup>227</sup> Dissenting in *Wolf v. Colorado*, and insisting that only the exclusionary rule will deter violations of the Fourth Amendment, Justice Murphy acted like Justice Blackmun in *Roe v. Wade*. He engaged in his own empirical research, which he described in footnote 5 of his opinion.<sup>228</sup> Police heads in twenty-six large cities selected at random, including those that applied the exclusionary rule and those that did not, responded to the Justice’s inquiries concerning the instruction provided to their police on the rules of search and seizure. These responses revealed a contrast between cities with the exclusionary rule and those without it. Generally, only cities with the exclusionary rule provided recruit training programs and in-service courses that included extensive education in the rules of search and seizure and the importance to the prosecution of obeying them. Justice Murphy acknowledged that his study “cannot, of course, substitute for a thoroughgoing comparison of present-day police procedures by a completely objective observer.”<sup>229</sup>

The search for a “completely objective observer” has been going on for a long time. As early as 1923, Professor E.S. Corwin, the eminent political scientist and constitutional lawyer, suggested that “some agency be created for enlightening the [Supreme Court] as to such matters [as legislative facts], upon whose results the [C]ourt could depend.”<sup>230</sup>

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see also Joe S. Cecil & Thomas E. Willging, *Accepting Daubert’s Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 998 (1994).

227. 468 U.S. 897, 927 (1984) (Blackmun, J., concurring). Justice Blackmun pointed to the fact that “the exclusionary rule itself has exacerbated the shortage of hard data concerning the behavior of police officers in the absence of such a rule.” *Id.* Nonetheless, he concluded, “we cannot escape the responsibility to decide the question before us, however imperfect our information may be, and I am prepared to join the Court on the information now at hand.” *Id.*

228. *Wolf v. Colorado*, 338 U.S. 25, 44 n.5 (1949) (Murphy, J., dissenting). In this case, the Court held that in a prosecution in a state court for a state crime, the Due Process Clause of the Fourteenth Amendment did not prohibit the admission of evidence obtained by an unreasonable search and seizure. *Id.* at 33 (majority opinion). The case was overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961).

229. *Wolf*, 338 U.S. at 44 n.5 (Murphy, J., dissenting).

230. E.S. Corwin, *Reports of the National Conference on the Science of Politics*, 18

Dean Roscoe Pound and Professor Frederick Beutel put forth the idea of an independent research agency under the control of the courts.<sup>231</sup> More recently, Professor Kenneth Culp Davis proposed that a research service similar to the Congressional Research Service be created to assist the Supreme Court in determining legislative facts.<sup>232</sup> In 1991, I commented on the Davis proposal as follows:

If these suggestions are to have any possibility of adoption by the courts, the proposed research institution should not be attached to any other branch of government, nor be a permanent agency, to which it might appear the courts were trying to delegate their undelegable powers. The National Academy of Science and its research arm, the National Research Council, would be ideal as research agencies for the federal courts, including the Supreme Court. They could create task forces to deal with particular legislative fact issues referred by the courts. Each task force would dissolve as soon as it completed its work. In this way, the country's experts most knowledgeable about a particular issue would be attracted to assist the courts.<sup>233</sup>

Not a single Justice responded favorably to Professor Davis's suggestion, or to mine. Yet the National Academy of Sciences–National Research Council (NAS-NRC) comes closer to being a “completely objective observer” than any other research institution in the country.<sup>234</sup> And its use of ad hoc panels to assist the Supreme Court would allay fears of improper influence upon the Court.

It may be objected that the use of an outside research agency to assist the courts would slow the process of judicial decisionmaking intolerably. But, it should be noted, *Bakke* was decided in 1978 and *Grutter* in 2003. There was time in the intervening twenty-five years for NAS-NRC task forces to study the effects of *Bakke* and what, if any, benefits flowed from preferential racial and ethnic admissions to colleges and universities. If it is the case that reference of a social scientific issue to an NAS-NRC panel may unduly delay a decision, the Court could decide the case on the basis of the data available to it and, simultaneously, commission a task force to study and report on the

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AM. POL. SCI. REV. 119, 153 (1924).

231. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 214 (Transaction Publishers 1999) (1921); Frederick K. Beutel, *Some Implications of Experimental Jurisprudence*, 48 HARV. L. REV. 169, 181 (1934).

232. Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 15–16 (1986).

233. Carl A. Auerbach, *A Revival of Some Ancient Learning: A Critique of Eisenberg's The Nature of the Common Law*, 75 MINN. L. REV. 539, 559 n.132 (1991).

234. The NAS has published studies on issues of constitutional significance. See, e.g., PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, NAT'L ACAD. OF SCIENCES, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 3 (Alfred Blumstein et al. eds., 1978) (explaining the Panel's goal as providing objective scientific analysis of various sanctions' effect on crime rates).

matter. If the resulting report indicates that the case was wrongly decided, the Court may overrule its decision and, if appropriate, do so prospectively only.

Because the studies I have briefly described indicate that a serious conflict exists in the data, analyses, and opinions of social scientists about the legislative facts on which the Court based its decision in *Grutter*, the Court should be open to a fresh challenge to that decision. NAS-NRC task forces would be helpful to the Court in dealing with that challenge. Needless to say, the Court would have the last word. But it is unjust to maintain a rule of constitutional law based on false assumptions of legislative facts. I recognize that particular issues of legislative fact may be impossible to resolve definitively. Even “completely objective observers” may differ reasonably. If a NAS-NRC task force should report that it cannot determine definitively whether educational benefits flow from student body racial and ethnic diversity, and the Supreme Court agrees, then strict scrutiny of the University of Michigan Law School’s preferential racial and ethnic admissions program would require the Court to hold that the program cannot be constitutionally justified by the claimed educational benefits.

